

Judgment of 30th March 2004, [K 32/03](#)

LINK BETWEEN RIGHTS IN HOUSING COOPERATIVES' PROPERTY UNITS AND MEMBERSHIP OF THE COOPERATIVE

Type of proceedings: Abstract review Initiator: Commissioner for Citizens' Rights	Composition of Tribunal: 5-judge panel	Dissenting opinion: 1
--	--	---------------------------------

Legal provisions under review	Basis of review
Housing cooperative members' obligation to exhaust intra-cooperative proceedings prior to initiating judicial proceedings to challenge a housing cooperative's decision to increase charges related to a property unit [Housing Cooperatives Act 2000: Article 4(8) (in the wording introduced in 2002)]	Principle of proportionality Right to ownership and other property rights and principle of equality in protection of such rights [Constitution: Articles 31(3), 64(1) and (2)]
Conditioning the ability to dispose of cooperative ownership right in a property unit upon the acquirer of such a right becoming a member of the cooperative [<i>Ibidem</i> : Article 17 ² (2) (in the wording introduced in 2002)]	
Expiry of a cooperative ownership right in a property unit following the lapse of six months from the date on which membership of the cooperative was terminated by reason other than death, where such a right has not been acquired by a person having submitted a declaration of membership of the cooperative [<i>Ibidem</i> : Article 17 ⁸ (1) (in the wording introduced in 2002)]	
Depriving the tenants of non-residential units, who are not members of the housing cooperative, of the right to acquire from the cooperative the ownership of such a unit [<i>Ibidem</i> : Article 39(1) (in the wording introduced in 2002)]	Rule of law Principle of equality in protection of property rights [Constitution: Articles 2 and 64(2)]

Persons utilising a property unit obtained from a housing cooperative may acquire one of the following legal titles to use such a property unit: a cooperative occupancy right in a residential unit (a contractual right similar to tenancy; conditioned upon membership of the cooperative), a tenancy, a cooperative ownership right in a property unit (a limited right *in rem* with the cooperative remaining the legal owner of the property unit whilst the member's right in respect thereof is disposable and inheritable in a manner similar to ownership rights) or "full" ownership (the owner of the property unit is, in such cases, a co-owner of the entire building within which the property unit is located).

Since the year 1999, the Constitutional Tribunal has issued several judgments concerning property relations between housing cooperatives and their members, or other persons utilising property units belonging to the housing resources of cooperatives (cf. cases numbered: [K 23/98](#), [SK 15/00](#), [K 5/01](#), [K 23/00](#), [SK 19/01](#)). In

particular, these judgments have dealt with the similarities between a cooperative ownership right in a property unit, on the one hand, and ownership, on the other hand, together with the link between the former and membership of the cooperative. Statutory regulation of this area has also been subject to amendment by the Housing Cooperatives Act 2000 and the Housing Cooperatives Amendment Act 2002.

One of the most controversial questions in the discussed matter is the necessity of maintaining, as well as the manner of regulating, the cooperative ownership right in a property unit. The mentioned right has its roots in the amendments relating to cooperative legislation, adopted by the communist authorities in 1961. It appeared in the Cooperative Law Act 1982 under the name “cooperative ownership right in a residential unit”. It is a limited right *in rem* which is, as disposable and inheritable, similar to ownership of the property unit. The essential difference involved the strict link between the right in question and membership of the housing cooperative: the possibility to acquire this right originally (i.e. as a first-time acquirer) was vested solely in members of the cooperative; the effectiveness of any disposition thereof for the benefit of a third party was conditioned upon the acquirer of such a right becoming a member of the cooperative. Consequently, the legislator adopted the principle of “one-subject” character of the cooperative ownership right in a residential unit, according to which the aforementioned right was only capable of being vested in one member of the cooperative; the member’s spouse was entitled to be co-holder of the right. The principle of linking the right in question with membership of the cooperative, as well as the “one-subject” principle (cf. above) formed the basis of the regulation concerning inheritance of this right.

A Constitutional Tribunal judgment of 25th February 1999 (reference number [K 23/98](#)) represented the first exception to the aforementioned rules. According to the Tribunal, statutory regulation envisaging the expiry of the right in a property unit following the death of the entitled person – where the successors of such a person had, within the defined period, not fulfilled the statutory requirements necessary to regulate the legal state of affairs in accordance with the aforementioned principles – was inconsistent with constitutional and international guarantees relating to ownership and inheritance.

The Housing Cooperatives Act 2000 introduced a specific “standstill” in relation to the cooperative ownership right in a residential unit. This Act removed the possibility for persons to acquire such a right originally, whereas persons already vested with this right obtained *ex lege* a claim against the cooperative to transform this right into the ownership right. The legislator initiated a “step backwards” in relation to the aforementioned tendency when, in 2002, the 2000 Act was amended, following a change in the parliamentary political composition following the 2001 elections. The construction of the limited right *in rem* discussed herein was “reinstated” by the legislator: housing cooperatives were once again permitted to confer property units upon their members by granting (also) the cooperative ownership right for their benefit. In the amended legal regulation, this solution was introduced under a new name: “cooperative ownership right in a property unit”, since the legislator performed the merging *sui generis* of the two, hitherto separate, constructions of the limited rights *in rem*: “cooperative ownership right in a residential unit” and “cooperative right in a non-residential unit”.

In the present case, the Commissioner for Citizens' Rights challenged four provisions of the amended Housing Cooperatives Act 2000, concerning various issues. Their common denominator is the differentiation of the legal situation of cooperative members, on the one hand, and non-members, on the other hand.

The Commissioner primarily challenged the provisions indicated in points 2 and 3 of the ruling, which refer to the concept forming the basis for the institution of a cooperative ownership right in a property unit, i.e. conditioning the existence of this right upon membership of the cooperative. Article 17²(2) of the Housing Cooperatives Act 2000 conditioned the efficacy of any disposal (and, *ipso facto*, acquisition) of a cooperative ownership right in a property unit upon the acquirer of such a right becoming a member of the cooperative. It should be underlined that, pursuant to Article 17¹(6) of the 2000 Act, the cooperative may not reject an application for membership in respect of any person satisfying the requirements of the cooperative's articles.

Article 17⁸(1) of the Act stated in turn that, as a rule, a cooperative ownership right in a property unit shall expire after six months following the entitled person's termination of membership of the cooperative for reasons other than death (as a result of the expiry of such a right, the cooperative was obliged to pay a concerned person an amount equivalent to the value of the lost right – cf. Article 17¹¹ of the Housing Cooperatives Act). In order to avoid the expiry of a cooperative ownership right in a property unit, an entitled person could dispose of such a right in favour of third parties; in such a case, the continuing duration of that right was conditional upon at least one of the acquirers of such a right becoming a member of the cooperative.

The Commissioner alleged that both of these provisions failed to conform to Article 31(3) of the Constitution, since they represented an unjustifiable interference into property rights protected by Article 64 of the Constitution (in the first case the applicant cited Article 64(1) and in the second one – Article 64(2)). According to the applicant, it was not necessary for the existence of a limited right *in rem* to be made conditional upon membership of a cooperative, since this did not represent a necessary solution required for realisation of the primary goal of a cooperative's activity, i.e. fulfilling the housing needs of its members.

Another of the challenged provisions – Article 4(8) of the Housing Cooperatives Act – required cooperative members wishing to challenge increases in the level of charges, imposed upon them by the cooperative, to cover the costs of exploiting and maintaining the cooperative's real estate and other obligations, to exhaust all possibilities of appeal within so-called intra-cooperative proceedings prior to initiating judicial proceedings. Article 32(1) of the aforementioned Act states that cooperative members may appeal, against resolutions concerning matters between them and the cooperative, to the organ specified in the cooperative's articles unless the latter excludes or limits such an entitlement. The cooperative's articles specify the principles and procedures for intra-cooperative proceedings, in particular the time-periods concerning the filing and consideration of appeals. Owners of property units who are not members of the cooperative may, however, challenge alterations to the level of such charges directly in judicial proceedings. The Commissioner for Citizens' Rights considered that this differentiation represented a limitation placed upon the constitutional right to equality in protection of property rights (Article 64(2)) and that it was unnecessary in light of the criteria expressed in Article 31(3) of the Constitution.

Moreover, Article 39(1) of the Housing Cooperatives Act was challenged as a result of it having been amended by the 2002 Act. In its original wording, Article 39 represented the basis for enfranchisement of tenants of garages and workplaces used for the pursuit of activities in the field of culture and arts, together with tenants of garages or non-residential units of a different designation existing on the date of the Act's entry into force. Pursuant to this provision, tenants were entitled to claim the transfer of ownership from the cooperative (on certain conditions, specified by statute), where the tenant or their predecessors bore all expenditures for the construction of such a building, even where the tenant was not a member of the cooperative. The changes introduced by the 2002 Amendment Act, *inter alia*, narrowed the categories of persons entitled to enforce such a claim, *ratione personae*, to tenants who were cooperative members. The Commissioner for Citizens' Rights submitted that depriving tenants of the right to enforce such a claim, on the basis that they were not members of the cooperative, amounted to an infringement of the principle of protecting acquired rights, as stemming from the principle of the rule of law (Article 2), and an infringement of the principle of equality in protection of property rights (Article 64(2) of the Constitution).

The Constitutional Tribunal found in favour of all of the applicant's allegations. In her dissenting opinion, *judge Teresa Dębowska-Romanowska* partly disagreed with the Tribunal's finding that Article 17²(2) of the Act infringed the Constitution (point 2 of the ruling), insofar as the majority of the Tribunal found that the requirement for the acquirer of a cooperative ownership right in a property unit to apply for membership of the cooperative failed to conform to the Constitution.

RULING

1. Article 4(8) of the Housing Cooperatives Act, insofar as challenged, does not conform to Article 64(2), read in conjunction with Article 31(3), of the Constitution.

2. Article 17²(2) of the aforementioned Act does not conform to Article 64(1), read in conjunction with Article 31(3), of the Constitution.

3. Article 17⁸(1) of the aforementioned Act does not conform to Article 64(2), read in conjunction with Article 31(3), of the Constitution.

4. Article 39(1) of the aforementioned Act, insofar as challenged, does not conform to Article 2, read in conjunction with Article 64(2), of the Constitution.

PRINCIPAL REASONS FOR THE RULING

1. The constitutional guarantees of ownership and other property rights (Article 64) together with the principles of correct legislation and protecting trust in the State and its laws, as stemming from the constitutional principle of the rule of law (Article 2), do not permit the legislator to arbitrarily differentiate the contents and limits of property rights that serve the same functions and protect similar interests. The creation of a new right *in rem* always requires justification, with regard to the need to ensure the protection of interests that may

not be realised in the same manner or to the same degree and with equal efficacy with the use of normative constructions already in existence. Within a system of rights *in rem*, it is permissible for multiple legal institutions having similar goals or serving to realise the same interests to function, provided that any differentiation therein, with respect to their object, economic goal or functions, is justified.

2. Although a cooperative ownership right in a property unit has been recognised as a limited right *in rem* it is, from an economic perspective, close to ownership. Additionally, the proprietary obligations imposed upon members of a housing cooperative are almost identical in respect of both of these rights (cf. e.g. Articles 4(3), 17³(2) and 18(2) of the Housing Cooperatives Act). In both cases cooperative members are burdened with the same costs concerning the construction of the property unit and subsequent exploitation thereof. Accordingly, it is unjustifiable for legislative solutions to place those possessing a cooperative ownership right in a property unit in an economically unequal and inferior position when compared to persons enjoying an ownership right. The inferior situation of the first group of persons is highlighted by provisions of the reviewed Act creating the link between a cooperative ownership right and membership of the cooperative. Those possessing a cooperative ownership right in a property unit bear an economic risk connected with the functioning of housing cooperatives which, as a matter of fact, encompasses all of the cooperative's actions, including those which do not directly relate to its goal, i.e., according to Article 1(1) of the Housing Cooperatives Act, "the fulfilment of the housing and other needs of the members and their families by providing the members with independent residential units or single-family houses, as well as with units of other designations".
3. In light of Article 64(1) of the Constitution, the possible restriction of the "accessibility" of constitutionally guaranteed subjective rights is not a matter within the absolute discretion of the legislator, but rather requires justification by reference to other constitutional values.
4. A statute should not introduce legal solutions which would transform the freedom of association into its very antithesis by creating mechanisms enabling the imposition of arbitrary criteria, fulfilment of which is necessary in order to enable members of certain types of organisations (in this case: housing cooperatives) to realise their interests.
5. It follows from the aforementioned reasoning that Article 17²(2) of the Housing Cooperatives Act fails to conform to the Constitution (cf. point 2 of the ruling), since it makes the effective disposal of a cooperative ownership right in a property unit (and, *ipso facto*, the acquisition thereof) conditional on the acquirer of such a right becoming a member of the cooperative, in consequence of the assumption that the cooperative ownership right in a property unit constitutes a right which is intrinsically linked to membership of the housing cooperative. The absence of any justification for such a condition is also confirmed by the existence of numerous exceptions from the rule linking the acquisition of a cooperative ownership right with membership of the cooperative, e.g. in the event that such a right is acquired by virtue of succession or in the event of the death of one of the entitled spouses (Article 17⁹(1) and (2) of the Housing Cooperatives Act).

6. For similar reasons Article 17⁸(1) of the Housing Cooperatives Act also fails to conform to the Constitution (cf. point 3 of the ruling) by providing – with some reservations – for the expiry of cooperative ownership rights in a property unit following the lapse of six months from the date on which membership of the cooperative was terminated for reasons other than death. This Article's failure to conform with Article 64(2) of the Constitution is also connected to the content of Article 17¹¹(1) of the Act, which requires the cooperative to pay an entitled person an amount equivalent to the market value of their cooperative ownership right in a property unit, upon the expiry of such a right, whilst restricting the maximum amount payable to a level equivalent to the amount the cooperative is able to acquire from the successor to the property unit in a tender organised by the cooperative. The fact that, at the moment of the tender, the property unit is usually still occupied by the hitherto member is not devoid of importance, since it contributes to a considerable reduction in the amount that would otherwise have been payable to the entitled person in the event that they were able to freely dispose of their right in the property unit.
7. In general, it is not possible to preclude the introduction, by the legislator, of mechanisms permitting housing cooperatives to exercise control over the manner in which its members may exercise a cooperative ownership right in a property unit, where the content and value of such a right differs significantly from ownership.
8. Article 4(8) of the Housing Cooperatives Act differentiates the legal position of persons in whom rights in property units belonging to cooperatives' resources are vested, thereby obliging them to pay charges connected to (inter alia) the exploitation and maintenance of the real estate to the benefit of the cooperative, depending on whether or not such a person is a member thereof. Whilst non-members may directly challenge alterations in the level of charges, by way of judicial proceedings, cooperative members must first exhaust the possibilities of appeal by way of so-called intra-cooperative proceedings. Meanwhile, the purpose of such charges is that users should bear any fixed expenditures necessary for the appropriate maintenance or preservation of the real estate. The criterion of membership of a housing cooperative is accordingly devoid of any importance, since the only appropriate distinguishing factor is the question of whether the real estate is used for housing purposes. The differentiation challenged in this case is based on an arbitrary criterion which is not necessary on constitutional grounds and, consequently, the challenged provision does not conform to Article 64(2), read in conjunction with Article 31(3), of the Constitution, insofar as indicated in point 1 of the ruling.
9. The principle of protecting legitimately acquired rights, stemming from the principle of the rule of law (Article 2 of the Constitution), also concerns so-called maximally-shaped legitimate expectations. Such expectations arise when all principal statutory prerequisites for acquiring rights under that statute have been fulfilled.
10. The claim, vested in tenants of non-residential units by virtue of Article 39 of the Housing Cooperatives Act in its original wording and relating to the transfer of ownership of such units by the cooperative to the tenant, even where the tenant is not a cooperative member, should – where the criteria specified in this provision are fulfilled and on the conditions indicated therein – be viewed as a maximally-shaped legitimate expectation. The legisla-

tor assessed the categories of entitled and obliged entities, indicated the content of the claim and defined its object, making the possibility for realisation of this right conditional upon fulfilment of pecuniary duties owed by the concerned person to the cooperative. As a result of the amendment to the wording of Article 39, introduced by the Amendment Act 2002, Article 39(1) makes the existence of any such claim conditional upon membership of the cooperative and thereby arbitrarily deprives tenants who are not cooperative members of this entitlement, which is not justified by reference to other constitutional values. This provision accordingly does not conform to Article 2, read in conjunction with Article 64(2), of the Constitution.

11. The formula adopted in the decision regarding the unconstitutionality of Article 39(1) of the Housing Cooperatives Act (point 4 of the ruling) indicates that persons in whom this provision (in its wording prior to amendment) vested the right to bring a claim against the cooperative may, from the moment this judgment enters into force, effectively also bring a claim by way of judicial proceedings in respect of the conclusion of a contract establishing a cooperative ownership right in the property unit or transferring ownership thereof. A prerequisite for bringing such a claim would continue to be that such persons fulfilled their pecuniary obligations in respect of the payment of dues indicated in this provision.
12. The finding that the various provisions of the Housing Cooperatives Act indicated in this judgment fail to conform to the Constitution means that, from the moment of this judgment's entry into force, any provisions contained within housing cooperatives' articles that are based on, or refer to, these unconstitutional statutory provisions shall lose their binding force.

MAIN ARGUMENTS OF THE DISSENTING OPINION

- The constitutional requirement to maintain proportionality and balance between the rights and obligations of parties to a legal relationship constitutes one of the limits on the legislator's discretion in shaping property rights. It is an entirely different issue, however, to prejudge the appropriateness of the existence of a particular property right *per se*. In this latter case, the legislator's discretion is significantly broader. Within a market economy, the existence of numerous variously shaped rights in a property unit or building provides potential acquirers with the ability to make a broader and more informed choice.
- The complete abolition of a limited right *in rem* made conditional upon membership of a housing cooperative (i.e. the cooperative ownership right in a property unit) is not justified merely by negative social experiences in relation to the functioning of housing cooperatives during the former political era, when such cooperatives were deprived of any realistic opportunity to function democratically because of their size and structure.
- According to Article 1(1) of the Housing Cooperatives Act, the aim of a housing cooperative is to fulfil the housing and other needs of its members and their families. This includes not only supplying apartments and single-family houses but also fulfilling such functions as, for example, developing principles for the harmonious co-usage of the building or residential area comprising cooperative buildings. The cooperative's inability to influence who will acquire a cooperative ownership right in a property unit within its property amounts to restricting its ownership rights and, accordingly, also restricts the rights of cooperative members who have defined their preferences in the cooperative's articles.
- The principle of the inherent link between a cooperative ownership right in a property unit and the requirement to become a member of the cooperative defines the essence and inviolable features of this right as a separate, limited right *in rem*. The legislator's decision to allow the acquisition of a cooperative ownership right in a property

unit, by successors who are not cooperative members, should be treated as an exception and a transitory situation.

- Two requirements for the effective disposal of a cooperative ownership right in a property unit arise from the challenged Article 17²(2) of the Housing Cooperatives Act. First, the requirement exists that any person(s) acquiring such a right submit a declaration indicating their will to become cooperative members. Second, the cooperative must accept such a person as one of its members.
- In ruling that Article 17²(2) of the Housing Cooperatives Act is unconstitutional, insofar as the first of the aforementioned requirements is concerned, the Constitutional Tribunal has exceeded the limits of its jurisdiction, as specified in Article 188(1) of the Constitution. The Tribunal, having assessed the rationality and appropriateness of regulating the various elements of the cooperative ownership right in a property unit, has challenged the rationality and appropriateness of its continued existence, effectively ruling that the inappropriateness of the existence of this right represents a reason for its failure to conform to the Constitution.
- A further issue, however, is whether the cooperative's rights in relation to acquirers, other than original acquirers, have been formulated in such a way as to ensure their conformity with the Constitution. One agrees with the view that it is disproportionate and excessive to require the acceptance of the relevant cooperative organ in such cases. It appears that regulation of the prerequisites for an effective acquisition of a cooperative ownership right in a property unit should be based on the *sui generis* principle of an automatic acquisition of the rights of a cooperative member following the submission of a membership declaration. The cooperative should merely have the statutory right to protest within a reasonable period of time.

Provisions of the Constitution

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 31. [...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 64. 1. Everyone shall have the right to ownership, other property rights and the right of succession.

2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.

3. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right.

Art. 188. The Constitutional Tribunal shall adjudicate regarding the following matters:

- 1) the conformity of statutes and international agreements to the Constitution;
- [...]